

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

61030

FILE: B-185722

DATE: June 25, 1976

MATTER OF: Products Engineering Corporation

98395

**DIGEST:**

1. Contention that bidder is not "manufacturer" or "regular dealer" within purview of Walsh-Healey Act is not for consideration by GAO, since responsibility for applying criteria of Walsh-Healey Act is vested in contracting officer subject to final review by Department of Labor.
2. Although protester disagrees with contracting agency on evaluation of bid samples, it is concluded agency's judgment was not without reasonable basis in fact, since protester has not shown that bid samples were not fairly and conscientiously evaluated by agency.
3. Workmanship requirements providing "all parts shall be free from defects or blemishes affecting their appearance" and "workmanship shall be first class throughout" are highly subjective and vague in that they fail to provide clear standard upon which bid samples will be evaluated. As such, although we agree with GSA that rejection of bid samples would have been legally questionable, bids should have been rejected and procurement resolicited in terms indicating what specific characteristics, if any, bid samples would have to meet.

By letter dated January 12, 1976, Products Engineering Corporation (Products) protested the award of contracts to the L. A. Spievak Corporation (Spievak) under invitations for bids (IFB) FPWP-C5-55690-A-7/7/75 (hereinafter No. "1") and FPWP-C8-55692-A-8/29/75 (hereinafter No. "2").

IFB No. "1" was issued by the General Services Administration (GSA) on June 5, 1975, for a requirements contract for measuring tapes, clamps and repair kits, measuring rules, chalk lines and reels. IFB No. "2" was issued by GSA on July 28, 1975, for a requirements contract for gauges. At bid opening for IFB No. "1" on August 8, 1975, Spievak was the low bidder on items 34-38, 40-42 and 50. At bid opening on August 29, 1975, for IFB No. "2" Spievak was low

bidder on items 2, 19, 42-44 and 46-47. Award was made to Spievak for items 34-38, 40-42 and 50 on IFB No. "1" and for items 2, 42-44 and 46-47 on IFB No. "2" on December 30, 1975.

Products bases its protest on the following grounds:

(1) Spievak does not qualify as a "manufacturer" or "regular dealer" within the purview of the Walsh-Healey Act, 41 U.S.C. § 35 (1970).

(2) Bid samples supplied by Spievak (specifically, for items 2, 19, 42-44 and 46-47) for IFB No. "2" did not conform to the IFB's specifications, thereby rendering the bid nonresponsive.

With regard to Products' first contention, we have on numerous occasions recognized that the responsibility for applying the criteria of the Walsh-Healey Act is vested in the contracting officer subject to final review by the Department of Labor. As such, our Office is not authorized to review determinations as to whether particular firms are "regular dealers" or "manufacturers" within the purview of the act. Case Inc.; Bethune Quilting Company, B-185422, January 29, 1976, 76-1 CPD 63. Accordingly, this issue is not properly for consideration by our Office.

With regard to Products' second allegation, clause 215 (Bid Samples) of IFB No. "2" in pertinent part states:

"(a) \* \* \* Samples will be evaluated to determine compliance with all characteristics listed for examination in the Invitation.

"(b) Failure of samples to conform to all such characteristics will require rejection of the bid.  
\* \* \*

The following subjective workmanship characteristic was listed for item 2: "Workmanship shall be first class throughout" (paragraph 3.19, Interim Amendment-1 to Federal Specification GGG-G-17b). For items 42-44 and 46-47, the following subjective workmanship characteristic was listed:

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"The workmanship shall be in accordance with the best grade of commercial practice covering this type of equipment. All parts shall be free from defects or blemishes affecting their appearance or which may affect their serviceability (paragraph 3.13, Federal Specification GG-G-86b, March 11, 1965)."

With regard to item 19, Products alleges that the bid sample submitted by Spievak was not chrome plated as required by the specification. GSA advises that it agrees with Products' contention and that Spievak's bid was accordingly rejected for this item.

With regard to items 42 and 43 Products alleges that the bid samples submitted by Spievak were unplated, had burrs around the holes and showed definite signs of corrosion. GSA, on the other hand, states that "no deficiencies of any kind were found in Spievak's representative samples [for items 42 and 43]."

In matters concerning the evaluation of bid samples, we have stated:

"\* \* \* As procurement officers are better qualified than this Office to review and evaluate the sufficiency of offered products to determine whether they meet the requisite characteristics [of the solicitation], we will not substitute our judgment for that of the contracting agency unless the record establishes that such judgment was without basis in fact. \* \* \*"

R & O Industries, Inc., B-183688, December 9, 1975, 75-2 CPD 377. Here, the protester, though indicating his disagreement with GSA on its evaluation of Spievak's bid samples for items 42 and 43, has not shown that the bid samples were not fairly evaluated by GSA. Thus, we must conclude that GSA's judgment concerning bid samples for items 42 and 43 was not without a reasonable basis in fact.

With regard to the bid sample representative of item 2, Products does not state areas where the sample deviated from the specifications. Concerning the bid sample representative of items 44, 46, and 47, Products contends that it did not " \* \* \* meet the criteria of a good commercial product \* \* \*" because it was pitted, rusty and not plated.

GSA acknowledges that defects in workmanship were found in the bid samples for items 2, 44, 46 and 47. However, it states that the defects related to appearance rather than serviceability. GSA also states that the workmanship requirements of the subject specifications " \* \* \* are insufficient to provide bidders with a definite specification on which they may intelligently bid, or for that matter, to provide the Government with a basis for evaluating bid samples for compliance with the specifications." GSA bases its position on past decisions of our Office requiring specifications to "clearly, precisely, and unambiguously" set forth the Government's requirements. Boston Pneumatics, Inc., B-180798, November 14, 1974, 74-2 CPD 260; R & O Industries, Inc., supra. In view of this, GSA elected to pursue the following course of action:

"Accordingly, since the workmanship provisions were determined to be legally unenforceable, and therefore could not form a basis for rejecting the bids as nonresponsive (see B-176647, November 21, 1972), [52 Comp. Gen. 285 (1972)], the contracting officer elected to proceed in accordance with the guidelines set forth in General Services Procurement Regulations (GSPR) 5A-2.202-4(g) and (i), regarding unlisted characteristics. Generally, these provisions provide a procedure whereby characteristics of an item which were not listed for examination under the applicable bid sample provisions, but which appear as deficiencies, are examined from the standpoint of whether the bidder is capable of performing in accordance with the entire specification. These provisions specifically provide:

"(g) If the bid sample has been found to conform to all of the characteristics listed in the solicitation, but found deficient with respect to one or more of the unlisted characteristics, a plant facilities report shall be requested as provided in § 5A-1.1205-3. A copy of the sample evaluation report shall be attached to the GSA Form 353 which shall include a request that special attention be given to the prospective contractor's ability (notwithstanding the deficiencies noted with respect to the characteristics not listed in the solicitation which were evaluated) to produce supplies fully conforming to applicable

specifications. For example, can the noted deficiencies be corrected by fairly simple production or process control adjustments, or would expensive and time-consuming retooling be involved? The plant facilities report shall include a specific statement regarding the prospective contractor's ability or inability to correct each noted deficiency in objective characteristics as well as an overall appraisal of his capability.'

\* \* \* \* \*

''(i) If the plant facilities report is favorable, award may be made if otherwise proper to the low bidder whose samples conform to the characteristics listed in the solicitations. However, concurrently with award the contracting officer shall specifically, in writing, call to the attention of the contractor the inadequacies of the sample with respect to unlisted characteristics and advise him of his responsibilities to furnish items conforming to all of the requirements of the specification. A letter format for this purpose is illustrated in § 5A-76.119. A copy of such letter shall be furnished to the appropriate Quality Control Division, for use when making subsequent inspection.'

"Inasmuch as the listed workmanship characteristics were unenforceable, it was necessary to determine whether there were any more basic but unlisted provisions of the specification which could be evaluated to insure that the Government would receive an acceptable product in accordance with GSPR 5A-2.202-4(g) and (i). What concerned our inspectors in their examination of the bid samples for contested items (44, 46, and 47) were the presence of pits on the bid samples which affected the appearance of these items, but this deficiency did not affect their serviceability. Under the specification (GG-G-86b) \* \* \*, the 'Finish' requirements specified in paragraph 3.3, however, would preclude the Government's acceptance of production items containing such pits. Accordingly, in conducting the plant facilities survey, GSA's Quality Assurance Specialist specifically checked whether Spievak could

meet the unlisted Finish requirements of the specification. As a result of this examination, he reported: 'BIDDER HAS THE CAPABILITY & MACHINERY TO PRODUCE ITEMS SO THEY WILL CONFORM TO PARA 3.3 FINISH OF SPECIFICATION GG-G-86b.' Similarly, on the bid sample for Item 2, our inspectors, in examining the applicable bid sample, were concerned with burrs protruding 'from the hole in the head adjacent to the rule slot.' Of course, in this case, neither appearance nor serviceability was mentioned in the Workmanship clause itself, which, as noted above, only contains the vague terms 'Workmanship shall be first class throughout.' Burrs, [which were not for evaluation to determine the bidder's responsiveness] however, are defects which are listed as Category 210 on page 25 of Specification GGG-G-17b \* \* \*. In response to these burr defects, our Quality Assurance Specialist stated: 'BIDDER HAS NEW DRILL JIG FOR DRILLING & COUNTER BORING HOLE IN THE HEAD OF THE DEPTH RULE. DRILLING & COUNTER BORING WILL ALLIMINATE [sic] BURRS.' Accordingly, the GSA Quality Assurance Specialist reported that Spievak was capable of performing as to Items 2, 42, 43, 44, 46, and 47. Pursuant to GSPR 5A-2.202-4(i), therefore, award was made to Spievak."

In Boston Pneumatics, supra, we held that "\* \* \* the terms of the invitation must be expressed clearly, precisely, and unambiguously so all prospective bidders will know what is required of the product being offered." After reviewing the record we found that terms such as "Standard practices of manufacturers producing tools of the type required in the specification," "general service conditions," "sufficient hardness," "limits established by good commercial practice," and "reliable and effective" failed to provide bidders with a sufficiently definite specification to permit intelligent bidding. Since award had already been made, and the items delivered, we recommended that corrective measures be taken to improve the specification requirements for future procurements.

In R & O Industries, Inc., supra, we held inter alia that the rejection of bid samples by GSA in a procurement of hammers on the basis that the handles were not "well proportioned" was legally questionable where the term "well proportioned" was not defined

in the solicitation. However, we upheld the rejection of the same bid samples on the alternative basis, advanced by GSA, of inadequate workmanship (i.e., loose handles and hammer heads) where workmanship was defined in the specification as follows: "Workmanship shall be first class in every respect. The tools shall have no burrs, fins, sharp projections, cracks, or any other imperfections which may impair their durability and serviceability." (Emphasis supplied.)

In the instant case, as previously noted, GSA contends that the defects found in Spievak's bid samples related to the appearance aspect of workmanship. However, even though the workmanship provision relevant to items 44, 46 and 47 provides that "[a]ll parts shall be free from defects or blemishes affecting their appearance \* \* \*," GSA argues (based on our holding in R & O Industries, Inc., supra) that the bid samples could not be rejected pursuant to this provision because "[t]he provision nowhere delineates what would constitute an acceptable appearance."

Like the workmanship provision in R & O Industries, Inc., supra, the workmanship provision for items 44, 46, and 47 includes specific evaluation factors. However, unlike the provision in R & O, which defines workmanship in terms of imperfections impairing durability and serviceability, the instant provision defines workmanship in terms of defects or blemishes affecting appearance. We think that this is a material difference. The terms "durability" and "serviceability" provide a reasonably clear standard upon which bid samples are to be evaluated. The term "appearance," on the other hand, is highly subjective. As such, it fails to adequately apprise bidders of the standards upon which their bid samples will be evaluated. Thus, we agree with GSA that the workmanship provision applicable to items 44, 46, and 47 is vague.

Unlike the workmanship provision relevant to items 44, 46, and 47 which is vague because it fails to include definitive workmanship evaluation criteria, the workmanship requirement for item 2 is vague because it fails to include any workmanship evaluation criteria ("workmanship shall be first class throughout").

See Communication Corps, Inc., B-179994, April 3, 1974, 74-1 CPD 168. Thus, although GSA found "\* \* \* burrs protruding 'from the hole in the head adjacent to the rule slot,'" it again believed (based on our holding in R & O Industries, Inc., supra) that it could not reject Spievak's bid sample for item 2 as nonresponsive because of the indefinite workmanship requirements. Further, with regard to items 2, 44, 46, and 47, citing 52 Comp. Gen. 285 (1972), GSA argues that an indefinite workmanship requirement is "legally questionable" and does not provide a compelling reason to cancel and readvertise the instant IFB.

The decision cited by GSA concerned the procurement of typewriters by GSA. The solicitation included a bid sample requirement for variant key pressure which subsequent to bid opening GSA found to be deficient in that there was no method to test for compliance with the stated requirement. As a result, GSA canceled the solicitation and resolicited the requirement absent, inter alia, the variant key pressure requirement. We held that the cancellation of the solicitation was not based on a "compelling reason" because "\* \* \* there was no reason to believe that firms other than the original 6 bidders would bid on the resolicitation or that such bidders would have offered any different equipment if the original specifications had reflected the change." 52 Comp. Gen., supra, at 289. We went on to note that the net effect of a resolicitation would be to create an auction atmosphere wherein new bids would constitute responses to the prior exposed bid prices rather than to the change in requirements.

The instant case is distinguishable from the 52 Comp. Gen. decision. Here, it is possible that if there was a definitive workmanship requirement or no workmanship requirement, different equipment would have been offered. Products indicated in its letter of January 12, 1976, that it would have offered equipment comparable to Spievak's at a lower price if it had known that would be acceptable. Therefore, an "auction atmosphere" would not have been created on resolicitation in the facts and circumstances of this case.

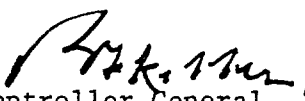
Thus, although we agree with GSA that rejection of Spievak's bid on items 2, 44, 46, and 47 on the basis of the instant workmanship requirements would be "legally questionable," we believe that under the circumstances present here the solicitations should have



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been resolicited in terms indicating exactly what specific characteristics, if any, the bid samples would have to meet. However, in view of the fact that the instant contract is a requirements type contract in which the Government guaranteed to purchase a minimum 25 percent of the total estimated quantities for each item (none of which has yet been purchased), and in view of GSA's advice to us that the deficiencies noted herein have been corrected in current IFB's, we do not feel that termination of the instant contract is in the best interests of the Government.

Accordingly, no corrective action is recommended.

  
Deputy Comptroller General  
of the United States